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91-1220

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER 7, 1991 TERM

WILLIAM VIEHWEG,
PETITIONER

V

JOSEPH DEVEREUX

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM H. VIEHWEG
PRO SE
114 W. SECOND SOUTH
MT. OLIVE, ILL. 62069
1-217-999-5061

QUESTIONS PRESENTED

1. Did the appellate court deny Viehweg his constitutional right to due process of law when it failed to favor his action and affirmed the district court's judgment dismissing his action for failure to state a claim for fraud by holding Viehweg's pro se pleadings to a higher standard of law than legally required?

2. Did the appellate court deny Viehweg his constitutional right to a jury when it affirmed the district court's judgment sustaining a statute of limitations defense by ruling as a "matter of law" against him on the factual question of whether Viehweg used due diligence in discovering the "facts" concerning the alleged constructive fraud when such "facts" arose as matters of law during an attorney/client relationship, and Viehweg pled due diligence?

TABLE OF CONTENTS

Questions Presented	i
Table of Authorities	1
Other Opinions on Case	2
Statement of Jurisdiction	3
Constitutional Provisions	4
Statement of the Case	5
Argument	9
Appendix:	
Judgment - Court of Appeals	19
Judgment - District Court	23
Mo Rev Stat §516.120	33
Mo Rev Stat §516.100	35
28 U.S.C. §1915	36
Plaintiff's 1st Amended Complaint	37

TABLE OF AUTHORITIES

5th Amendment to the Constitution	
7th Amendment to the Constitution	
Mo Rev Stat 516.120(5)	14
Mo Rev Stat 516.100	14
28 U.S.C. §1915	9
Haines v Kerner 92 S. CT 594 (1972)	12
Gardine v Cottey 230 S.W.2d 731 (Mo banc 1950)	13
Harding v Modern Income Life Ins. Co. 593 S.W.2d 568 (Mo App 1979)	16
White v Mulvania 575 S.W. 2d 184,191 (Mo banc 1978	16

OTHER OPINIONS ON CASE

This case was first initiated in the United States District Court, Eastern District of Missouri, Eastern Division, Cause Number 90-2322-C-7 and on March 1, 1991 Judge Hamilton entered the Court's memorandum and order dismissing Viehweg's complaint at the pleading stage for failure to state a cause of action due to statute of limitations.

Viehweg timely appealed to the United States Court of Appeals for the Eight Circuit, Number 91-1798, briefs were filed, and on September 24, 1991 said Court entered its judgment and per curiam (unpublished) affirming the judgment of the district court.

No other court or administrative office heard or ruled on any of the matters of law or fact involved in this instant case.

STATEMENT OF JURISDICTION

On September 24, 1991 the United States Court of Appeals for the Eighth Circuit entered its judgment affirming the judgment of the district court against Viehweg. No rehearing was requested by either party. On December 17, 1991, this Court's Justice Blackmun granted Viehweg's request for an extension of time and ordered that the time for filing a petition for a writ of certiorari be extended to and including January 21, 1992. Viehweg initiated this case in federal court on jurisdictional grounds of diversity of citizenship, 28 U.S.C. 1332, and appealed its decision to the federal appellate courts, as of right, and now timely petitions this Court for a writ of certiorari.

CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

SEVENTH AMENDMENT - In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

On February 11, 1985 Re/max of America, Inc. initiated a civil action against Viehweg in the United States District Court, Eastern District, Eastern Division, Cause No. 85-0349C-3, titled Re/max of America v. Viehweg. On February 14th Devereux was appointed, as per 28 U.S.C.§1915, Viehweg's legal counsel. On April 22nd, Devereux moved for and was granted the court's permission to withdraw as counsel. The court did not appoint new counsel, leaving Viehweg unrepresented. A non-jury trial was held with Viehweg acting pro se on June 2nd. On September 11th, the court entered its judgment against Viehweg.

Viehweg timely appealed, in forma pauperis to the United States Court of Appeals for the Eighth Circuit and requested an attorney. The court of

appeals denied his request and dismissed his appeal on December 12th of the same year, 1985.

Five years later, on December 12, 1990, Viehweg, pro se, initiated this civil action, Cause No. 90-23220C-7 against Devereux in the same United States District Court, same district, same division, upon the jurisdictional grounds of diversity of citizenship, 28 U.S.C. 1332. Devereux was represented by Ronald C. Willenbrock of the law firm of Amelung, Wulff & Willenbrock.

On January 17, 1991 Viehweg filed his 1st Amended Complaint attempting to allege constructive fraud. On January 25th, Devereux filed his motion to dismiss for failure to state a claim raising the statute of limitation defense R.S.Mo §516.100 and R.S.Mo. §516.120. On February 4th, Viehweg filed his motion for leave to amend his 1st Amended Complaint.

On March 1st, the court entered its judgment granting Devereux's motion to dismiss ruling that Viehweg improperly pled fraud and granting Devereux's statute of limitations defense by ruling that Viehweg was held as a "matter of law" to have discovered Devereux's alleged fraud on or before September 11, 1985, the date the trial court entered its judgment against Viehweg in the Re/max v. Viehweg case, and also denied Viehweg's motion for leave to amend.

Viehweg, pro se, timely appealed to the United States Court of Appeals for the Eighth Circuit, No. 91-1798, raising the constitutional questions of due process and right to a jury. Devereux was again represented by Ronald C. Willenbrock of the law firm of Amelung, Wulff & Willenbrock. Briefs were filed. On September 24th, the appeals court entered

its judgment affirming the district court's ruling.

Viehweg, still pro se, timely initiated his appeal to this Honorable Court by requesting an extension of time to file, which was granted up to and including January 21, 1992. Viehweg herewith files his petition for writ of certiorari raising the same constitutional questions of due process and right to a jury. Again Devereux is represented by Ronald C. Willenbrock, of the law firm of Amelung, Wulff & Willenbrock.

ARGUMENT

COMES NOW William H. Viehweg and begs this Honorable Court's forgiveness for his imperfect pleadings, for this mere reluctant pro se, stands not only truly humbled by the majesty of the law of our great land, but also a bit dumbfounded by it technicalities.

Federal courts must favor actions by pro se litigants against their former federal court appointed attorney which sound in fraud and arise from the attorney/client relationship, because: (1) the courts themselves cannot be said to be "impartial" in the matter, and (2) the legal profession has shown a tremendous propensity to not sue its fellow members and therefore effectively deny the pro se litigant legal counsel.

28 U.S.C. §1915(d) authorizes the

court only to "request" an attorney to represent an indigent party. The courts themselves are divided as to whether such an attorney can refuse the "request". Therefore judicial/political pressure occurs: the attorney feeling "obligated" to oblige the court, and the court feeling "obligated" to make its "appropriation" as painless-as-possible.

So, is, or is not, the attorney appointed by "order of the court"? For if he is "ordered" by the court to represent the indigent, or, even if he "freely accepts" such order, if the attorney in said representation intentionally fails to perform his legally obligated duties to his client and therefore frauds the client, is not the attorney in contempt of the court's order? Would not the court then have a duty to investigate such matters when brought to its attention?

Consider also that the legal profession is the only profession that can actually sit in judgment of itself, as all federal judges (rightfully being the profession's most esteemed members) are held by law to be experts in the matter and yet no one would think of disqualifying them. But also consider that the courts are not required to make legal counsel available, nor allowed to award legal fees, to pro se litigants filing actions for fraud by their former court appointed attorneys.

Certainly it is understandable that individual attorneys avoid such clients in order to avoid buring "professional" bridges. Certainly it is understandable that judges personally "resent" such actions. Certainly it is imperative that in such actions, not only are all parties' rights upheld, but the playing field be

made as level as possible for the sake of the pro se. Therefore the courts must favor such actions or deny the pro se due process of law. And it certainly wouldn't hurt the lay public's confidence in both the profession, and the judicial system itself. It is so little to ask for; so easy to grant; so important to judicial fairness.

- Pleading -

Viehweg's 1st amended complaint was pled as a pro se and therefore his pleadings should have been held to a less stringent standard than those drafted by lawyers. Haines v Kerner 92 S. Ct 594 (1972) The district court itself found Viehweg's complaint to have pled nine different breaches of fiduciary duty. Each of those breaches was pled to have been intentional. Further, averment #8 of said complaint clearly pleads that Devereux

entered into his court appointed attorney/client relationship with Viehweg intending to defraud Viehweg.

Missouri's highest court has long held that an intentional breach of fiduciary duty is constructive fraud and therefore actual fraud need not be pled nor proven.

"The nature of a lawyer's profession necessitates the utmost good faith toward his client, and the highest loyalty and devotion to his client's interest....The relationship between attorney and client is highly fiduciary and of very delicate, exacting and confidential character, requiring very high degree of fidelity and good faith on attorney's part....A breach of fidelity to a client's interest constitutes constructive fraud." Gardine v Cottey 230 S.W.2d 731 (Mo banc 1950)

Therefore Viehweg did, in his

imperfect but understandable pro se fashion, plead a cause of action for constructive fraud, and for the courts to hold Viehweg's pleading to a higher standard of technical perfection or to a higher standard of tort - actual fraud - would deny Viehweg his due process of law. Besides, Viehweg did move to amend his complaint in an attempt, though probably also imperfect, to correct some possible technical errors.

- Jury -

Defendant Devereux raised a statute of limitations defense. Mo Rev. Stat. §516.100 and §516.120(5) are controlling here with the former stating that the period of limitation does not begin to run until the cause of action has accrued, and the latter stating that the cause of action for fraud does not accrue until the discovery by the aggrieved party, at any

time within ten years, of the facts constituting the fraud.

The question now is one of discovery. Simple deduction shows that the "window of discovery" must have been between the date five years previous to Viehweg's initiation of this case, December 12, 1985 and the initiation of the parties' attorney fiduciary relationship, February 14, 1985. Such period is only some nine months long and throughout it Viehweg was actually represented by Devereux until April 22nd, was involved in trial matters relating to the Re/max case till the trial on June 2nd and the judgment September 11th, and was involved in appeals of the Re/max case till December 12th, 1985.

Further, the burden of discovery upon a Plaintiff is qualified with a Plaintiff being required to use due diligence. But such due diligence is further qualified

requiring that the Plaintiff must have within his power the means of acquiring knowledge as to the fraudulent facts, that the Defendant must not have used any artifice or trick to conceal his fraud, and that no fiduciary relationship existed. Harding v Modern Income Life Ins. Co. 593 S.W.2d 568 (Mo App 1979)

Here, Viehweg had no duty to discovery the fraudulant facts because he was frauded during a fiduciary relationship. White v Mulvania 575 S.W.2d 184,191 (Mo banc 1978) Further, the relationship was court sanctioned. It was the court who chose the attorney. It was the court who, as Viehweg pled in his complaint in averment 13, said during Devereux's withdrawal motion hearing, that Devereux's ability and confidence are beyond question.

Further, the "facts" in this

constructive fraud action involve "matters of law" to which, again, Viehweg had no duty to question, or seek a second opinion.

Even so, Viehweg pled in his complaint, averment 15 and 16, that he did make an extraordinary effort to obtain legal consultation but was denied, and that it was not until the early fall of 1990 that Viehweg first learned of such "matters of law". Therefore Viehweg pled facts which a reasonable person could find that Viehweg used, if required, due diligence, and therefor the question must go to the jury Viehweg requested in averment 40 of his complaint.

Holding Viehweg to a duty not required by law is a denial of his due process rights. Considering the issue of due diligence in this case as a "matter of law" is a denial of his right to a jury.

In consideration of the above arguments, Viehweg respectfully request this court grant him a writ of certiorari.

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 91-1798

WILLIAM H. VIEHWEG, APPELLANT

V

JOSEPH F. DEVEREUX, JR.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

PER CURIAM

(unpublished)

William H. Viehweg appeals from the district court's (the honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri) order dismissing under Federal Rule of Civil Procedure 12(b)(6) his complaint claiming breach of fiduciary duty and fraud against his former attorney, Joseph F. Devereux, Jr. We affirm.

Whether a complaint states a cause of action is a question of law which this court reviews de novo. Hilton v. Pine Bluff Public Schools, 796 F.2d 230, 231 (8th Cir. 1986). This court also reviews de novo a district court's interpretation of state law. Salve Regina College v. Russell, 111 S. Ct. 1217,1221 (1991). The district court correctly determined that Viehweg's action was required to be brought within five years under Mo. Rev. Stat. §§516.120(4) and (5) (1986). See

Vogel v. A.G. Edwards & Sons, Inc., 801 S.W.2d 746, 752 (Mo. Ct. App. 1990); Carr V. Anding, 793 S.W.2d 148, 149-50 (Mo. Ct. App. 1990). The court also correctly determined that the cause of action accrued at the latest on September 11, 1985. See Mo. Rev. Stat. §§516.100 and 516.120(5); Zero Mfg. Co. V. Husch, 743 S.W.2d 439, 441 (Mo. Ct. App. 1987); Kueneke v. Jeggle, 658 S.W.2d 516, 518 (Mo. Ct. App. 1983). We find meritless Viehweg's argument that he pleaded facts showing his action was not time-barred.

Devereux properly raised the statute of limitations defense. See Southwestern Bell Tel. Co. V. Buie, 758 S.W.2d 157, 161 (Mo. Ct. App. 1988). In any event, Viehweg's complaint reveals a time bar on its face. Schnabel v. Taft Broadcasting Co., 525 S.W.2d 819, 821(Mo. Ct. App. 1975) (if time bar clearly appears from

face of pleading motion to dismiss even without specification of grounds properly sustained); see also Zero Mfg. Co., 743 S.W.2d at 441.

We also conclude that the court properly denied Viehweg leave to file a second amended complaint and to join an additional defendant, and that the court properly denied his requests for sanctions as moot.

Accordingly, the judgment is affirmed.

Before Gibson, Wollman, and Magill, Circuit Judges. September 24, 1991

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

CAUSE NO. 90-2322-C-7

WILLIAM H. VIEHWEG, Plaintiff

V

JOSEPH F. DEVEREUX, JR.

MEMORANDUM AND ORDER

This matter is before the Court on Defendant Joseph Devereux's motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)((6). Plaintiff filed a motion to amend his complaint after the motion to dismiss was filed. Defendant has not answered the original complaint. A party may amend his pleading once as a matter of

course at any time before a responsive pleading without leave of court. Fed. R. Civ. P. 15(a). Defendant filed a motion to dismiss the first amended complaint. It is this motion to dismiss the first amended complaint that is discussed in this memorandum.

Plaintiff raises a number of factual allegations in his complaint, all relating to Defendant's legal representation of Plaintiff in the case Re/max of America v. Viehweg, 85-0349-C-3.

The allegations in the complaint can be summarized as follows:

(1) Defendant misrepresented his legal duties to Plaintiff (¶ 9);

(2) Defendant withdrew only five weeks prior to trial by falsely claiming Plaintiff wanted him to file a counterclaim for improper purposes (¶¶ 12, 34, 35);

(3) Defendant failed to investigate and file a motion to dismiss based on a foreign corporations's lack of capacity to sue (¶¶ 17, 18);

(4) Defendant failed to counsel Plaintiff to return documents Plaintiff was wrongfully retaining (¶¶ 19, 20);

(5) Defendant failed to review documents before delivering them in response to a production request (¶¶ 21, 22);

(6) Defendant used undue influence to persuade Plaintiff to waive his right to a preliminary injunction hearing (¶¶ 23- 24);

(7) Defendant filed a counterclaim without Plaintiff's permission (¶¶ 25, 26);

(8) Defendant failed to file a compulsory counterclaim (¶¶ 27-31);

(9) Defendant waived Plaintiff's right to a jury trial without PLaintiff's knowledge (¶¶ 32, 33).

Plaintiff characterizes his cause of action as breach of fiduciary duty and fraud.

Defendant maintains Plaintiff's complaint is barred by the statute of limitations. The applicable statute of limitations for both the fraud and breach of fiduciary duty causes of action is five years. §516.120 R.S.Mo.; Carr v. Anding, 793 S.W.2d 148, 149-50 (Mo. Ct. App. 1990). Statutes of limitations are favored in the law and exceptions are strictly construed. Langendoerfer v. Hazel, 601 S.W.2d 290 (Mo. Ct. App. 1980). Courts are not at liberty to extend the statute of limitations even in cases of hardship. Id. The cause of action is not deemed to accrue for statute of limitations purposes when the wrong is done or the technical breach occurs, but when the damage resulting therefrom is

sustained and capable of ascertainment. §516.100 R.S.Mo. The statute of limitations begins to run once the fact of damage is capable of ascertainment, even though the amount of damages is not yet ascertainable. Zero Mfg. Co. v. Husch, 743 S.W.2d 439, 441 (Mo. Ct. App. 1987). If a party has the means of discovery in his power, he is deemed to have discovered the injury. Harris v. Nichols, 714 S.W.2d 540, 543 (Mo. Ct. App. 1986). When damage is ascertainable is an objective test decided as a matter of law. Anderson v. Griffin, Dysart, Taylor, Penner, and Lay, 684 S.W.2d 858, 861 (Mo. Ct. App. 1984).

Defendant was appointed to represent Plaintiff on February 14, 1985. His motion to withdraw as counsel was granted by the Court on April 22, 1985. On September 11, 1985, the Court entered judgment against Plaintiff in Re/max of

America v. Viehweg. His appeal was dismissed December 12, 1985. Plaintiff filed the present action on December 12, 1990.

In determining whether an applicable statute of limitations bars recovery, it is necessary to establish when that cause of action accrued. Jepson v. Stubbs, 555 S.W.2d 307 (Mo. banc 1977); Carr, 793 S.W.2d at 150.

All of Plaintiff's damages occurred between February 14, 1985, the date Defendant began to represent Plaintiff, and September 11, 1985, the date judgment was entered against Plaintiff. Damages relating to the withdrawal were ascertainable when Defendant withdrew on April 22, 1985. Without addressing each of the allegations of malpractice separately or pinpointing the exact date of accrual, the latest date the cause of action accrued was September 11, 1985.

Plaintiff contends that he could not ascertain damages until he educated himself as to his legal rights in 1990. However, Plaintiff misinterprets the law as to when damages are ascertainable. Mere ignorance of the Plaintiff of his cause of action will not prevent the running of the statute of limitations. Carr, 793 S.W.2d at 150. An exception to this rule exists when a Plaintiff is relying on an attorney. Id. However, Plaintiff can claim no reliance after April 22, 1985, when Defendant withdrew.

Plaintiff's action for breach of fiduciary duty is barred by the statute of limitations. He has failed properly to plead fraud; but even if he had, that action is also time-barred. Section 516.120(5) provides that a cause of action for fraud is not deemed to have accrued until discovery by the aggrieved party at

any time within ten years of the fraud. After discovery the plaintiff in a fraud action has five years to file suit. §516.120(5) R.S.Mo.; Zero Mfg. Co., 743 S.W.2d at 442. A cause of action for fraud accrues when knowledge of the facts constituting the alleged fraud is acquired. Kueneke v. Jeggle, 658 S.W.2d 516, 518 (Mo. Ct. App. 1983). The plaintiff is deemed cognizant of facts that should have been known and is held to have known facts that could, by exercise of ordinary care commensurate with the circumstances, have been discovered by due diligence. Id. If the plaintiff had means of discovery in his power, he is deemed to know of the fraud. Harris, 714 S.W.2d at 543; Harding v. Modern Income Life Ins. Co., 593 S.W.2d 568, 573 (Mo. Ct. App. 1979).

Plaintiff has also filed a motion

asking leave to amend his complaint and join a party. Plaintiff realleges the same factual allegations, separating them into counts. The Court has examined the proposed Second Amended Complaint and finds it also barred by the statute of limitations. All allegations as to the party Plaintiff wishes to join also relate to the same factual allegations and the same time period. Accordingly,

IT IS HEREBY ORDERED that Plaintiff's motion for leave to amend his first amended complaint and permissive joinder of defendant is **DENIED.**

IT IS FURTHER ORDERED that Defendant's motion to dismiss for failure to state a claim upon which relief can be granted is **GRANTED** and Plaintiff's complaint is **DISMISSED** with prejudice.

IT IS FURTHER ORDERED that Defendant's motion to dismiss for failure

to state a claim upon which relief can be granted filed January 11, 1991; Plaintiff's motion for sanctions filed January 17, 1991; Defendant's amended motion to dismiss for failure to state a claim upon which relief can be granted filed January 17, 1991; Plaintiff's motion to amend court order of January 17, 1991; Plaintiff's motion for sanctions filed January 25, 1991; Defendant's alternative motion to strike various portions from Plaintiff's first amended complaint; Defendant's alternative motion to dismiss Plaintiff's first amended complaint or to compel Plaintiff to separate into counts; and Defendant's alternative motion to dismiss or strike certain portions of Plaintiff's first amended complaint are **DENIED** as moot.

Dated this 1st day of March, 1991. Jean C. Hamilton, United States District Judge.

MISSOURI REVISED STATUTE 516.120

What actions within five years

Within five years:

(1) All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited;

(2) An action upon a liability created by a statute other than a penalty or forfeiture;

(3) An action for trespass on real estate;

(4) An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated;

(5) An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.

MISSOURI REVISED STATUTE 516.100

Period of limitation prescribed

Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued; provided, that for the purposes of sections 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

28 U.S.C.A. §1915

Proceedings in forma pauperis

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress. An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such

printing is required by the appellate court, be paid by the United States, and the same shall be when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the

costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor the United States.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

CAUSE NO. 90-2322-C-7

WILLIAM H. VIEHWEG, Plaintiff

v

JOSEPH F. DEVEREUX, JR.

1ST AMENDED COMPLAINT

Filed January 17, 1991

COMES NOW Plaintiff WILLIAM H. VIEHWEG and for his cause of action for fraud against Defendant, states as follows:

1. Plaintiff WILLIAM H. VIEHWEG (hereinafter "VIEHWEG") is an individual residing at 114 W. 2nd South, Mt. Olive, Illinois 62069.

2. Defendant Joseph F. Devereux, Jr. (hereinafter "DEVEREUX") is an individual residing at 13260 Kenroyal Dr., St. Louis, Missouri 63131.

3. This Court has jurisdiction over this action pursuant to the terms of Title 28 U.S.C. §1332 since the parties are citizens of different states and matter in controversy exceeds the sum or value of $50,000.00 exclusive of interest and costs.

4. Defendant DEVEREUX was a licensed attorney (member #24113 of the Missouri Bar Association and a member of the bar of this Court), practicing law and maintaining a law office at Suite 735, 1015 Locust Street, St. Louis, Missouri 63101 throughout the calendar year 1985.

5. On or about Thursday, February 14th, 1985, Defendant, knowing or having should known Plaintiff to be financially

indigent and unemployed, that Plaintiff was neither an attorney, nor sufficiently knowledgeable as to legal matters so as to be capable of sufficiently exercising or defending Plaintiff's legal rights in a court of law, and knowing or having should known the character and complexity of the legal issues and procedures involved, voluntarily accepted court ordered appointment by United States Magistrate David D. Noce, of gratuitous legal representation of Plaintiff and entered into an attorney-client relationship with Plaintiff (hereinafter RELATIONSHIP) as to all legal matters relating to cause #85-0349C-3, titled Re/max of America (hereinafter RE/MAX) vs. Viehweg, filed in the United States District Court, Eastern District of Missouri, Eastern Division, on Monday, February 11th, 1985 (hereinafter "SUIT") before the Honorable Judge William L. Hungate.

6. Within the said attorney-client relationship, it being of a highly confidential and fiduciary nature, Plaintiff had the right to trust, and did trust, and to rely on that trust, and did rely, that Defendant would act with the utmost good faith, integrity and candor toward Plaintiff and the highest loyalty and devotion to Plaintiff's interests.

7. That within said RELATIONSHIP, it being of a confidential and fiduciary nature, Defendant had a duty to Plaintiff to act with the utmost good faith, candor and integrity toward Plaintiff, to act with the highest loyalty and devotion to Plaintiff's interests, to not take undue advantage of Plaintiff, to keep Plaintiff informed as to matters relating to Plaintiff's substantial legal rights, to strictly follow Plaintiff's instructions as to Plaintiff's substantial legal

rights, to protect Plaintiff's confidential attorney/client communications, to not withdraw from said SUIT without Plaintiff's consent or good cause, and to fulfill his fiduciary obligations to Plaintiff.

8. That Defendant undertook the legal representation of Plaintiff from the onset having no intention of fulfilling his fiduciary obligations to Plaintiff but rather to win personal favor with the trial court judge in furtherance of Defendant's legal career and to dispose of said SUIT as expediently as possible, irregardless of Defendant's duty to Plaintiff or of Plaintiff's legal rights.

9. That Defendant upon entering said RELATIONSHIP and throughout said RELATIONSHIP, knowing that Defendant possessed a position of superior legal knowledge and authority and trust and

confidence, and knowing that Defendant was Plaintiff's last chance at legal representation, did misrepresent Defendant's duties to Plaintiff and Plaintiff's substantial legal rights by concealing them from Plaintiff through silence when Defendant had a duty to speak, and never informing Plaintiff of any of Defendant's several duties in said SUIT or of Plaintiff's several substantial legal rights in said SUIT, that Defendant knew he was falsely representing said duties and said rights, that Defendant intended that Plaintiff would rely on said misrepresentations, that Defendant knew that PLaintiff would be damaged if Plaintiff relied upon Defendant's misrepresentations, that Plaintiff did not know the falsity of said misrepresentations, that Plaintiff did completely rely on said

misrepresentations, that Plaintiff suffered damage because he relied and acted upon Defendant's said misrepresentations, and that Defendant benefited from Plaintiff's reliance upon said misrepresentations.

10. That Defendant's fraud upon the Plaintiff, obvious by Defendant's multiple intentional breaches of his fiduciary duty to Plaintiff, pleaded below, was intentional, willful, wanton, malicious, in bad faith, in reckless disregard of Plaintiff's legal interests, and without just cause or excuse.

11. That throughout said RELATIONSHIP Plaintiff had no knowledge of any of Defendant's legal duties to Plaintiff or of any of Plaintiff's substantial legal rights.

12. That Defendant, upon requesting the trial court's permission to withdraw,

knowing that such permission was required and that said permission was only granted for good cause, did, while Defendant was still within said RELATIONSHIP, knowingly falsely argue to the Court that his withdrawal was based on mere differences of opinion by Defendant and Plaintiff, knowingly falsely argued to the Court that Plaintiff had requested Defendant to file a counterclaim for improper purposes, and knowingly falsely argued to the Court that Plaintiff, pro se, could correct any errors and continue in said SUIT without any delay in the set trail date, which was only 5 weeks away and no answer in response to Re/max's substantially amended complaint had yet been filed, in order to wrongfully obtain the court's permission to withdraw.

13. That the trial Court responded to the Defendant's wrongful request to

withdraw by granting said request and stating:

> "The Court appointed Mr. Devereaux because it regards any matter of injunctive relief and a matter of such serious overtones, as the accusations in this one contain, as substantial and serious and because it has seen Mr. Devereaux before the bar of this court throughout this community. And he is one of the young leaders of the bar, and his ability and confidence are beyond question. Now, the court was, it believes, bending over backward to make certain that somebody did not go unrepresented. You know, if I get you Bruce Sutter and you don't want him to pitch,then you can pitch yourself."

14. That Plaintiff did attempt, pro se, to correct any known errors throughout the end of the lower court proceeding, upon appeal to the 8th Circuit Court of appeal which dismissed Plaintiff's appeal on December 12, 1985, and upon appeal to the Supreme Court which found Plaintiff's action to be untimely.

15. That in the year 1989, Plaintiff did solicit an attorney to represent Plaintiff in an action for legal malpractice against Defendant and said attorney, without counseling Plaintiff on any legal matters, refused said case on the grounds that no St. Louis attorney would sue another St. Louis attorney for malpractice, that it would be bad for business, and that in the spring of 1990, Plaintiff did place an ad in the St. Louis Post Dispatch, costing over $1100.00,

soliciting an attorney to represent Plaintiff in a legal malpractice case against Defendant, and further, that Plaintiff did in the spring of 1990 did personally solicit from over 3000 attorneys, legal representation for a legal malpractice action against Defendant at a cost of over $2000.00, all resulting in not a single attorney ever even consulting Plaintiff as to any legal matters regarding any possible legal action Plaintiff may have had against Defendant.

16. That it was not until the early fall of 1990 that Plaintiff, doing personal legal research in expectation of filing a pro se action against Defendant for legal malpractice, did first learn that Defendant had duties to Plaintiff of which Defendant violated, and that Plaintiff had multiple substantial legal

rights of which defendant violated, and that Defendant had a duty to inform Plaintiff of said duties and rights, and that Defendant's violation of said duties through misrepresentation was fraud.

17. That Defendant knew, or should have known, the following: that as per RSMo §351.570, foreign corporations doing business in the state of Missouri must procure a certificate of authority from the Missouri Secretary of State or as per RSMo §351.635 can not maintain any suit or action, either legal or equitable, in any of the courts of Missouri, that Re/Max was a foreign corporation doing business in Missouri, that Re/max had not procured said certificate, that said SUIT was filed under the Missouri laws, that the right to challenge the legal capacity of Re/max to sue Plaintiff was one of Plaintiff's substantial legal rights, that Defendant

had a duty to Plaintiff to investigate Re/max's capacity to sue Plaintiff, and that Defendant had a duty to Plaintiff to file a motion to dismiss in said SUIT for Re/max's lack of capacity to sue.

18. That Defendant breached his fiduciary duty to Plaintiff when he intentionally, willfully, in bad faith, and in reckless disregard of Plaintiff's legal interests and rights, without just cause or excuse, and in wrongful pursuit of Defendant's own personal interests, did not investigate Re/max's capacity to sue, and did not file in Plaintiff's behalf a motion to dismiss said SUIT on grounds that Re/max had no capacity to sue.

19. That Defendant knew or should have known the following: that Plaintiff admitted removing certain documents from Re/max's office and further admitted that said documents were not Plaintiff's

property, that Plaintiff rightfully removed said documents but had unknowingly wrongfully retained them, that not only had Plaintiff no desire to retain said documents, but that Plaintiff would have readily returned said documents to Re/max if so counseled by Defendant, and that Defendant had a duty to Plaintiff to so counsel Plaintiff to return said documents to Re/max.

20. That Defendant breached his fiduciary duty to Plaintiff when he intentionally, willfully, and in bad faith, and in reckless disregard of Plaintiff's legal interests and rights, without just cause or excuse, and in wrongful pursuit of Defendant's own personal interests, did not counsel Plaintiff to return above said documents to Re/Max.

21. That Defendant knew or should

have known the following: that Plaintiff delivered to Defendant as per Defendant's request, a large box with all of Plaintiff's numerous documents however remotely related to said SUIT, that Defendant explicitly told Plaintiff that he was going to spend a weekend reviewing all of said documents, that Plaintiff was ordered to produce at Plaintiff's upcoming deposition only certain specified documents, that the majority of said boxed documents were not subject to the order to produce and were confidential attorney/client communications, and that Defendant had a duty to not breach or violate Plaintiff's confidential attorney/client communications.

22. That Defendant breached his fiduciary duty to Plaintiff when he intentionally, willfully, in bad faith, and in reckless disregard of Plaintiff's

legal interests and rights, without just cause or excuse, in wrongful pursuit of Defendant's own personal interests, and in known violation of Defendant's duty to Plaintiff, without any prior examination of above said boxed documents, and without any consultation with Plaintiff, summarily turned the entire box of documents over to Re/max for Re/max to rummage through in search of evidence to use against Plaintiff.

23. That Defendant knew or should have known the following: that an upcoming preliminary injunction hearing was one of Plaintiff's substantial legal rights, that Defendant had no authority to waive Plaintiff's right to said hearing without Plaintiff's express consent, that Defendant had previously counseled Plaintiff saying that said hearing was extremely important and of great bearing

on the outcome of the final trial, that Plaintiff was being damaged by the overly restrictive temporary injunction which prohibited Plaintiff from "corresponding or communicating in anyway with any present or past franchisees of Plaintiff Re/max, and/or from making any other statements or representations, either in writing or orally, regarding Plaintiff Re/max and/or its officers and franchisees to any person or party whatsoever", that Plaintiff was still anxiously and desirously waiting for a meeting between Defendant and Plaintiff when they would sit down and discuss Plaintiff's case for the first time, and that Defendant had a duty to not use his position of superior knowledge, authority and confidence to unduly influence Plaintiff in matters against Plaintiff's best interest.

24. That Defendant breached his

fiduciary duty to Plaintiff when he intentionally, willfully, in bad faith, and in reckless disregard of Plaintiff's legal interests and rights, without just cause or excuse, and in wrongful pursuit of Defendant's own personal interests, used undue influence to persuade Plaintiff to barter away Plaintiff's right to said preliminary hearing in exchange for the above said meeting.

25. That Defendant knew or should have known the following: that the filing of a counterclaim was a substantial legal right belonging to Plaintiff, that Defendant had no authority to file a counterclaim in Plaintiff's behalf without Plaintiff's consent, that Plaintiff neither did nor would consent to a counterclaim being filed in his behalf for wrongful discharge of an oral employment agreement, and that Defendant had a duty

to not take any unauthorized actions affecting Plaintiff's substantial legal rights unless for good cause.

26. That Defendant breached his fiduciary duty to Plaintiff when he intentionally, willfully, in bad faith, and in reckless disregard of Plaintiff's legal interests and rights, without just cause or excuse, and in wrongful pursuit of Defendant's own personal interests, and completely without Plaintiff's knowledge, wrongfully filed without Plaintiff's consent a counterclaim in Plaintiff's behalf for wrongful discharge from an oral employment agreement which contained known numerous false allegations of substantial fact.

27. That Defendant knew or should have known the following: that Federal Rule of Civil Procedure 13(a) requires compulsory counterclaims be filed or they

are waived, that Plaintiff was completely unaware of said rule, that Plaintiff had, in good faith and without improper purposes, desired and instructed Defendant to file a counterclaim for fraud against Re/max based on Plaintiff's allegations of fraudulent hire.

28. That Plaintiff's above said allegations of fraudulent hire included that Re/Max, when entering into a contract with Plaintiff for Plaintiff to sell Re/max's franchises, and representing itself nationally as an expert in issues relating to independent contractor versus employee status, did knowingly, falsely represent Plaintiff's status to be that of an independent contractor and intended that Plaintiff rely on said representations and act accordingly, when in truth, Plaintiff was by law an employee, and Plaintiff, completely

ignorant of said representations's falsity, relied its being true and rightfully acted accordingly, eventually privately using certain information, which had Plaintiff truly been an independent contractor would have been Plaintiff's personal property and rightfully his to act upon, and Plaintiff was substantially damaged when Re/max subsequently filed said SUIT claiming that Plaintiff was hired as an employee, and that said certain information, because of said claimed employment relationship, was the property of Re/max and that Plaintiff had therefore wrongfully used said certain information resulting in damage to Re/max.

29. That Plaintiff's above said allegations of fraudulent hire also included that Re/max, when entering into said contractual relationship with Plaintiff, did knowingly, falsely

represent itself as having developed a highly successful concept for operating 100% commission real estate sales offices with claims of substantial average earnings, when in truth Re/max's concept was an abysmal failure with said average earning claims actually representative of less than 1% of Re/max's franchisees, and that Re/max made said false representations to induce Plaintiff into said service contract, and Plaintiff, completely ignorant of said representation's falsity, rightfully relied on said representations being true, and that Plaintiff would not have entered into said contract had he known said representations were false, and because of said false representations, entered into said contract with Re/max, and was damaged by said false representations by suffering mental anguish and being exposed to public

scorn as being known as one of the solicitors for Re/max's outrageous fraud upon the buying public.

30. That Defendant knew or should have known the following: that above said counterclaims for fraudulent hire were of substantial merit, that Defendant had originally explicitly agreed to file said counterclaims, that Plaintiff's said desired counterclaims were subject to Supreme Court Rule 13(a), and that Defendant had a duty to file any counterclaim coming under the jurisdiction of said rule 13(a) irregardless of his personal opinion of their ultimate merits.

31. That Defendant breached his fiduciary duty to Plaintiff when he intentionally, willfully, in bad faith, and in reckless disregard of Plaintiff's legal interests and rights, without just cause or excuse, in wrongful pursuit of

Defendant's own personal interests, without any explanation to Plaintiff, and against Plaintiff's explicit instructions, wrongfully refused to file said counterclaims for fraudulent hire.

32. That Defendant knew or should have known the following: that the right to a jury trial is a substantial legal right belonging to the Plaintiff, that Plaintiff had, in said SUIT, the right to a jury trial as per the Seventh Amendment to the United States Constitution, that Defendant had no authority to waive Plaintiff's right to a jury trial without express instructions from Plaintiff, and that Defendant had a duty to follow Plaintiff's instructions regarding Plaintiff's right to a jury trial.

33. That Defendant breached his fiduciary duty to Plaintiff when he intentionally, willfully, in bad faith,

and in reckless disregard of Plaintiff's legal interests and rights, without just cause or excuse, and in wrongful pursuit of Defendant's own personal interest, withheld from Plaintiff the knowledge of Plaintiff's right to a jury trial, ignored Plaintiff's express instructions demanding a jury trial, waived, without Plaintiff's consent, Plaintiff's right to a jury trial, allowed the trial to be set as a non-jury trial, and hid the knowledge of the non-jury setting from Plaintiff.

34. That Defendant knew or should have known the following: that the Plaintiff had expressly informed Defendant that the Plaintiff would not relieve Defendant of his obligation to represent Plaintiff, that Plaintiff desperately needed an attorney to represent him in said SUIT and that Defendant was Plaintiff's only hope, and that Defendant

had a duty to not withdraw as attorney in said SUIT without good cause or until his fiduciary obligations to Plaintiff were completed.

35. That Defendant breached his fiduciary duty to Plaintiff when he intentionally, willfully, wantonly, maliciously, in bad faith, in reckless disregard of Plaintiff's legal interests and rights, without just cause or excuse, and in wrongful pursuit of Defendant's own personal interests, in retaliation for Plaintiff's wanting to rightfully be informed of his substantial legal rights and to be able to exercise said rights, without Plaintiff's consent or good cause, before said SUIT came to completion, and before the completion of Defendant's fiduciary obligations to Plaintiff, withdrew as Plaintiff's attorney from said SUIT.

36. That Plaintiff was damaged by Defendant's fraudulent actions when Plaintiff's above said counterclaims for fraudulent hire against Re/max which should have resulted in $200,000.00 in actual and punitive damages or recession of contract being awarded against Re/max and for Plaintiff were lost to Plaintiff forever, and when said SUIT, which should have been dismissed do to Re/max's lack of capacity to sue, went to trial, with Plaintiff, who should have been represented by defendant, having to proceed pro se, burdened by above said overly restrictive preliminary injunction denying Plaintiff the right to personally investigate his own defense, and therefore present any evidence in his defense or to challenge Re/max's evidence, which should not have been in force, with Re/max using Plaintiff's privileged attorney/client

communications as evidence against Plaintiff, which shouldn't have been, and when Re/max's highly questionable, false, and unrebutted evidence as to matters of fact were weighed by the trial judge and not a jury of Plaintiff's peers, as should have been, resulting in a $85,500 in damages, which is still outstanding and subject to Court imposed interest, and a permanent injunction against Plaintiff, which should have resulted in a judgment denying Re/max's request for relief, all of which would not have occured had Defendant not wrongfully frauded Plaintiff.

37. That as a result of Defendant's wrongful actions Plaintiff has suffered severe mental anguish and damage to Plaintiff's good reputation.

38. WHEREFORE, Plaintiff VIEHWEG prays for damages against Defendant

DEVEREUX in the amount of $600,000.00 for the actual damages incurred by VIEHWEG to date as a result of DEVEREUX's wrongful actions described herein, or in the alternative, $1.00 in nominal damages, plus cost; and

39. FURTHER, Plaintiff VIEHWEG prays for punitive damages against Defendant DEVEREUX in the amount of $100,000.00; and

40. FURTHER, Plaintiff VIEHWEG demands a jury trial.

Supreme Court, U.S.
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No. 91-1220

In The

Supreme Court of the United States

October Term, 1991

WILLIAM H. VIEHWEG,

Petitioner,

vs.

JOSEPH F. DEVEREUX, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The following questions, rather than the questions identified by petitioner, would be presented for review in this case:

1. Whether this Court is without jurisdiction to review petitioner's petition for writ of certiorari in that this petition has not been filed within the period allowed by law and that plaintiff's application to extend the time to file his petition failed to set forth specific grounds to justify a time extension?

2. Whether the District Court erred in sustaining defendant's motion to dismiss for failure to state a claim upon which relief may be granted as plaintiff's cause of action sounding in legal malpractice and/or fraud is barred by § 516.100 and § 516.120 R.S. Mo. (1986), because plaintiff did not timely file his action within five (5) years of having determined or should have determined due diligence, the existence of the alleged wrongful conduct on the part of the defendant?

3. Whether the District Court erred in sustaining defendant's motion to dismiss for failure to state a claim upon which relief may be granted as plaintiff did not rely on constructive fraud as the basis of his cause of action and/or defendant timely raised a statute of limitations defense to plaintiff's legal malpractice and/or fraud claims?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations ii

Statement of the Case 1

Perceived Misstatements of Fact or Law 5

Reasons for Denying the Writ 7

I. This Court is without jurisdiction to review petitioner's petition for writ of certiorari in that this petition has not been filed within the period allowed by law and that petitioner's application to extend time was not supported by specific grounds upon which to justify any extension of time to file his petition for writ of certiorari. 7

II. Petitioner fails to present an appealable issue in his petition for writ of certiorari, pages 9 through 12, generally arguing that the federal courts must favor actions by *pro se* litigants against their federal court-appointed attorneys which sound in fraud and arise from the attorney-client relationship in that no issue is presented for review and if such issue is found to be asserted, it was not presented below. 9

III. The District Court did not err in sustaining defendant's (respondent's) motion to dismiss for

Contents

Page

failure to state a claim upon which relief may be granted as plaintiff's (petitioner's) cause of action sounding in legal malpractice and/or fraud is barred by §§ 516.100 and 516.120 R.S. Mo. (1986), because plaintiff (petitioner) did not timely file his action within five (5) years of having determined or should have determined with due diligence, the existence of the alleged wrongful conduct on the part of the defendant (respondent). 10

IV. The District Court did not err in sustaining defendant's (respondent's) motion to dismiss for failure to state a claim upon which relief may be granted as plaintiff (petitioner) did not rely on constructive fraud as a basis of his cause of action and/or defendant timely raised the statute of limitations defense to plaintiff's (petitioner's) legal malpractice and/or fraud claims thereby not entitling plaintiff (petitioner) to proceed to a jury trial. 13

Conclusion 14

TABLE OF CITATIONS

Cases Cited:

Carr v. Anding, 793 S.W. 2d 148 (Mo. Ct. App. 1990) 4

EEOC v. FLRA, 476 U.S. ____, 106 S. Ct. 1679 (1986) 9

Contents

Page

Harding v. Modern Income Life Ins. Co., 593 S.W. 2d 568 (Mo. Ct. App. 1979) 11

Kleem v. Immigration and Naturalization Service, 479 U.S. 1308 (1986) 6, 8

Kueneke v. Jeggle, 658 S.W. 2d 516 (Mo. Ct. App. 1983) 11

Mississippi v. Turner, ____ U.S. ____, 111 S. Ct. 1032 (1991) 6, 8

RE/MAX of America, Inc. v. Viehweg, No. 91-1788 (8th Cir. 1991) 5

RE/MAX of America, Inc. v. William H. Viehweg, Cause No. 85-0349C(3) (E.D. Mo. 1983) 2, 6

State v. Harris, 714 S.W. 2d 516 (Mo. Ct. App. 1986) 11

Zero Mfg. Co. v. Husch, 743 S.W. 2d 439 (Mo. Ct. App. 1987) 4

Statutes Cited:

Mo. R.S. § 516.100 (1986) ..... i, 3, 4, 10

Mo. R.S. § 516.120 (1986) ..... i, 3, 4, 10

28 U.S.C. § 1332 2

Contents

Page

Rules Cited:

Supreme Court Rules:

Rule 13.2 7

Rule 13.4 7

Rule 20.6 9

Federal Rule of Civil Procedure 12(d)(6) 3

APPENDIX

Appendix A — Application for Extension of Time to File Petition for Writ of Certiorari 1a

Appendix B — Motion in Opposition to Application for Extension of Time 4a

Appendix C — Judgment of the United States Court of Appeals for the Eighth Circuit Dated September 24, 1991 ..... 8a

Appendix D — Opinion of the United States District Court of Appeals for the Eighth Circuit Dated September 11, 1991 ..... 10a

No. 91-1220

In The

Supreme Court of the United States

October Term, 1991

WILLIAM H. VIEHWEG,

Petitioner,

vs.

JOSEPH F. DEVEREUX, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eight Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent is dissatisfied with petitioner's statement of the case and therefore provides the Court with the following:

Petitioner, William H. Viehweg, brings this appeal following the Eighth Circuit Court of Appeals affirming the ruling of the

District Court sustaining the motion of respondent, Joseph F. Devereux, Jr., to dismiss for failure to state a claim upon which relief may be granted. Petitioner filed his action premised upon 28 U.S.C. § 1332 alleging fraud and/or legal malpractice against Mr. Devereux on December 12, 1990, after the following relevant events:

On February 14, 1985, respondent, a licensed attorney and member in good standing of the Missouri Bar Association, was appointed by the United States Magistrate Judge of the Eastern District of Missouri, David C. Noce, to defend petitioner in a federal case filed against the petitioner by his former employer RE/MAX of America, titled *RE/MAX of America, Inc. v. William H. Viehweg*, Cause No. 85-0349C(3) (E.D. Mo. 1985). Subsequent to apparent disagreement between petitioner and respondent concerning the defense effort, the petitioner instructed the respondent to cease representing him in the action. Respondent subsequently filed a motion to withdraw as petitioner's counsel from the case which was granted by the court on April 22, 1985. The petitioner did not obtain further legal representation and proceeded to represent himself *pro se* before the District Court for the remainder of the action. The case was tried to the bench during the week of June 3, 1985, before United States District Judge William L. Hungate. On September 11, 1985, the court ruled in favor of the plaintiff, RE/MAX of America, Inc. and ordered the petitioner to pay RE/MAX in excess of $85,000. Further, the court issued injunctive relief in favor of RE/MAX.

Following the ruling, the petitioner *pro se* filed his notice of appeal on October 16, 1985, in an attempt to perfect his appeal challenging the sufficiency of the judgement. On October 28, 1985, the Eighth Circuit Court of Appeals [Cause No. 85-2243(EM)] denied petitioner's motion for appointment of counsel and issued a show cause order to petitioner permitting him fifteen (15) days in which to rebut the dismissal of his appeal as frivolous. On

November 15, 1985, petitioner filed his response to the show cause order. On December 12, 1985, the Eighth Circuit Court of Appeals ruled by entering the following order:

> On October 28, 1985, Court ordered appellant to show cause within fifteen (15) days while appeal should not be dismissed as frivolous. Appellant filed response on November 15, 1985, after consideration of appellant's response, appeal is ordered and dismissed as frivolous and not brought in good faith.

On December 12, 1990, five (5) years and ninety-two (92) days after the September 11, 1985 ruling of the District Court, petitioner filed the underlying action naming respondent as defendant and alleging causes of action premised on legal malpractice and a claim presumably alleging fraud. Service of process was had upon respondent on December 31, 1991. Thereafter, respondent timely filed his motion to dismiss petitioner's complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(d)(6) of the Federal Rules of Civil Procedure, stemming from the grounds that the complaint should be dismissed as the action was time-barred by the applicable statute of limitations provided for in §§ 516.100 and 516.120 R.S. Mo. (1986).

On January 17, 1991, petitioner personally served upon the offices of respondent's counsel a first amended complaint, together with other pleadings. A reading of all papers served revealed that petitioner attempted to plead legal malpractice and a cause of action presumably alleging "fraud" by adding, among other things, paragraphs 8 through 16.

On February 4, 1991, petitioner moved to file his second amended complaint to add allegations and join a co-defendant.

Taking up all motions, the District Court, Honorable Jean C. Hamilton, United States District Judge, on March 1, 1991, ruled that the statute of limitations for petitioner's cause of action sounding in breach of fiduciary duty, and if the complaint could be construed to plead a cause of action for fraud, is five (5) years, citing § 516.120 R.S. Mo.; *Carr v. Anding*, 793 S.W. 2d 148, 149-50 (Mo. Ct. App. 1990). The District Court noted that, for the purposes of the statute of limitations, a cause of action for fraud or breach of fiduciary duty occurs when the damage resulting therefrom is sustained and capable of ascertainment. § 516.100 R.S. Mo.; *Zero Mfg. Co. v. Husch*, 743 S.W. 2d 439, 441 (Mo. Ct. App. 1987) (statute of limitations begins to run once the fact of damage is capable of ascertainment despite the fact that the amount of damage is not determined). The District Court held that petitioner's damages occurred between February 14, 1985, (the date upon which respondent began to represent the petitioner), and September 11, 1985 (the date judgment was rendered against the petitioner). The District Court further held that the petitioner was capable of ascertaining damage with respect to respondent's representation on the date when respondent withdrew, April 22, 1985. The District Court determined that the latest date that the cause of action premised upon fraud or breach of fiduciary duty accrued on behalf of petitioner was on September 11, 1985. The District Court concluded that petitioner's action for breach of fiduciary duty was barred by the statute of limitations and explictly stated that the petitioner failed to properly plead fraud, but stated that even if he had, the action was time-barred by § 516.120 R.S. Mo. The District Court further concluded that the petitioner knew or should have known the facts of the alleged fraud at a point in time no later than September 11, 1985, and therefore, the petitioner's action premised on fraud was time-barred. The District Court denied the petitioner's motion to amend and join an additional co-defendant stating that the allegations of the Second Amended Complaint related to the same time-barred causes of action pleaded in the first amended complaint. Further, the District

Court granted respondent's motion to dismiss with prejudice and denied all other outstanding motions as moot.

On March 25, 1991, petitioner filed his notice of appeal with the Eighth Circuit Court of Appeals citing that the District Court erred in granting respondent's motion to dismiss; denying his motion for leave to amend and join a co-defendant; dismissing as moot petitioner's sanctions motion; and, denying his motion to amend and join prior to ruling on his motion to strike respondent's reply. A briefing schedule was established, and after a permitted extension of time, the petitioner filed his brief on June 3, 1991.

On September 24, 1991, the Eighth Circuit Court of Appeals filed its affirmance of the District Court's ruling. *RE/MAX of America, Inc. v. Viehweg*, No. 91-1788, slip op. (8th Cir., September 24, 1991) (R.A. 8a-12a). On or about December 7, 1991, the petitioner filed his application for extension of time for which to file his petition for writ of certiorari. In response, on December 12, 1991, respondent filed his motion in opposition to petitioner's application for extension of time to file petition for writ of certiorari. On December 17, 1991, the petitioner and respondent were notified that Justice Blackmun signed an order on December 17, 1991, extending the time for which to file his petition for writ of certiorari, up to and including January 21, 1992. On January 21, 1992, the petitioner filed his petition for writ of certiorari with this Court.

PERCEIVED MISSTATEMENTS OF FACT OR LAW

1. Since the United States Court of Appeals for the Eighth Circuit issued its order on September 24, 1991, affirming the judgment of the District Court as reprinted in petitioner's brief, pages 19 through 22, petitioner's petition for writ of certiorari was not timely filed, despite petitioner's application for an

extension of time for which to file, since petitioner's grounds for the extension of time failed to meet the standard of "good cause shown" required for granting a time extension. *Kleem v. Immigration and Naturalization Service*, 479 U.S. 1308 (1986); *Mississippi v. Turner*, ____U.S.____, 111 S. Ct. 1032 (1991).

2. Petitioner alleges, in his statement of the case, that respondent Devereux moved for and was granted the court's permission to withdraw as counsel is incorrect in that subsequent to an apparent disagreement between a petitioner and respondent concerning the defense effort in the underlying civil action styled *RE/MAX of America, Inc. v. William H. Viehweg*, Cause No. 85-0349C(3) (E.D. Mo. 1985), petitioner instructed respondent to cease representing him in the action. Respondent subsequently filed a motion to withdraw as petitioner's counsel from the case which was granted by the court on April 22, 1985.

3. Petitioner alleges, in his statement of the case, page 6, that he initiated his civil action against respondent exactly five (5) years after the Eighth Circuit Court of Appeals dismissed his appeal in the underlying action styled *RE/MAX of America, Inc. v. William H. Viehweg*, is incorrect since the filing of the civil action on December 12, 1990, was five (5) years and ninety-two (92) days after the September 11, 1985 ruling of the District Court in the underlying action styled *RE/MAX of America, Inc. v. William H. Viehweg*.

4. Petitioner alleges, in his statement of the case, page 8, that he timely initiated his appeal to this Court by requesting an extension of time in which to file, which was granted up to and including January 21, 1992, is incorrect in that petitioner failed to properly support his application for extension of time by setting forth "good cause shown" upon which for the Court to grant the application for extension of time to file his writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

This Court is without jurisdiction to review petitioner's petition for writ of certiorari in that this petition has not been filed within the period allowed by law and that petitioner's application to extend time was not supported by specific grounds upon which to justify any extension of time to file his petition for writ of certiorari.

As referenced beginning on page 7 of petitioner's petition, the United States Court of Appeals for the Eighth Circuit, filed its September 24, 1991 order, ruling that the judgment of the Honorable Jean C. Hamilton, United States District Judge, was affirmed.

Per Supreme Court Rule 13.4, the time for filing a petition for writ of certiorari runs from the date of judgment or decree sought to be reviewed, which, in this case, would be the above referenced order of September 24, 1991. If, however, an application for extension of time for which to file a petition for writ of certiorari is timely filed with this Court, and supported with "good cause shown", the Court may grant the extension of time. Sup. Ct. R. 13.2.

Petitioner filed, on or about December 7, 1991, his application for extension of time for which to file his petition for writ of certiorari with this Court. (*See* Respondent's Appendix.) On December 12, 1991, respondent filed his motion in opposition to the petitioner's application for extension of time to file petition for writ of certiorari, (*see* Respondent's Appendix) (R.A. 1a-2a), stating that petitioner's application for extension of time to file his petition for writ of certiorari (R.A. 3a-5a), did not meet the standard of "good cause shown" for granting an extension of

time. *Citing Kleem v. Immigration and Naturalization Service*, 479 U.S. 1308 (1986); *Mississippi v. Turner*, ____ U.S. ____, 111 S. Ct. 1032 (1991).

Petitioner's grounds for seeking the extension of time for which to file his petition for writ of certiorari included the following:

> 3. Viehweg, a non-attorney, has been *pro se* through this action solely because of his inability to obtain legal counsel.
>
> 4. As *pro se*, Viehweg misunderstood the ninety (90) days filing as merely a Notice of Appeal, not necessitating a complete Petition upon which the immediate fate of Viehweg's action will be determined.
>
> 5. As such, Viehweg spent most of his allotted time soul-searching and issue challenging and only recently did decide to appeal and now finds himself faced with a difficult task of writing a Petition that not only conforms to the on-first-sight complicated rules of procedure, but also is able to hopefully persuade this august Court to take my issue serious — whether or not it ultimately decides to grant my Writ.
>
> 6. The subject matter involved in this action is brought by an attorney upon his client, and as such is, besides being delicate, difficult and serious.

As so held by this Court in *Kleem v. Immigration and Naturalization Service*, 479 U.S. 1308 (1986) and *Mississippi v. Turner*, ____U.S.____, 111 S. Ct. 1032 (1991), this Court held that an attorney's desire for additional time to research and prepare

the writ of certiorari in response to an appellate court's adverse ruling upon important questions of the Constitution of the United States and state budgetary cuts resulting in the reduction of an appellate staff, did not meet the standard of "good cause shown" for the granting of a time extension. In addition, this Court has stated that under this Court's Rule 20.6, requests for extensions of time "are not favored."

Accordingly, petitioner's grounds for which to seek his extension of time for which to file his petition for writ of certiorari clearly failed to meet the standard of "good cause shown" for the granting of a disfavored time extension, and therefore petitioner's writ of certiorari to this Court is time-barred and therefore should be dismissed for wanting of jurisdiction.

II.

Petitioner fails to present an appealable issue in his petition for writ of certiorari, pages 9 through 12, generally arguing that the federal courts must favor actions by *pro se* litigants against their federal court-appointed attorneys which sound in fraud and arise from the attorney-client relationship in that no issue is presented for review and if such issue is found to be asserted, it was not presented below.

Respondent is unable to effectively respond to petitioner's argument located on pages 9 through 12 of his petition for writ of certiorari due to the fact that no appealable issue is asserted. Respondent can only state that the record of the District Court reflects that as a result of an apparent disagreement between petitioner and respondent concerning the defense effort, petitioner instructed respondent to cease representing him in the action. Further, petitioner failed to raise this "issue" in appeal which bars its current assertion. *EEOC v. FLRA*, 476 U.S. ____, 106 S. Ct. 1678, 1681 (1986). Consequently, petitioner's argument,

being unintelligible and being brought for the first time before this Court without prior appellate review, fails to properly present an appealable issue. Accordingly, petitioner's petition for writ of certiorari should be denied for failure to present an appealable issue.

III.

The District Court did not err in sustaining defendant's (respondent's) motion to dismiss for failure to state a claim upon which relief may be granted as plaintiff's (petitioner's) cause of action sounding in legal malpractice and/or fraud is barred by §§ 516.100 and 516.120 R.S. Mo. (1986), because plaintiff (petitioner) did not timely file his action within five (5) years of having determined or should have determined with due diligence, the existence of the alleged wrongful conduct on the part of the defendant (respondent).

Petitioner's argument contained in pages 12 through 14, generally convey to the Court that in petitioner's opinion he pleaded constructive fraud in his first amended complaint and that as a *pro se* litigant he would be denied his "due process of law" if he was held to a higher standard of "technical perfection or to a higher standard of tort — actual fraud".

Petitioner's first amended complaint contains the following relevant allegations:

> 12. That defendant, upon requesting the Trial Court's permission to withdraw knowing that such permission was required and that said permission was only granted for good cause, did, while defendant was still within said Relationship, knowingly falsely argued to the Court that his withdrawal was based on mere differences or

> opinion by defendant and plaintiff, knowingly falsely argued to the Court that plaintiff had requested defendant to file a Counterclaim for improper purposes, and knowingly falsely argued to the Court that plaintiff, *pro se*, could correct any errors and continue in said Suit without any delay in the said trial date, which was only five (5) weeks away and no answer in response to RE/MAX's substantially Amended Complaint had yet been filed, in order to wrongfully obtain the Court's permission to withdraw . . .
>
> 16. That it was not until the early Fall of 1990 that plaintiff, doing personal research in the expectation of filing a *pro se* action against defendant for legal malpractice, did first learn that defendant had duties to plaintiff of which defendant violated, and that plaintiff had multiple substantial legal rights of which defendant violated, and that defendant had a duty to inform plaintiff of said duties and rights, and that defendant's violations of said duties through misrepresentation was fraud.

A cause of action for fraud accrues when knowledge of the facts constituting the alleged fraud is acquired. *Kueneke v. Jeggle*, 658 S.W. 2d 516, 518 (Mo. Ct. App. 1983). The petitioner is deemed cognizant of the facts that should have been known and is held to have known facts that could, by reason of ordinary care and being commensurate with the circumstances, have been discovered by due diligence. *Id.* If petitioner had the means with which to discover the fraud, he is deemed to know of the fraud. *State v. Harris*, 714 S.W. 2d 516, 573 (Mo. Ct. App. 1986); *Harding v. Modern Income Life Ins. Co.*, 593 S.W. 2d 568, 573 (Mo. Ct. App. 1979).

The point in time when petitioner could have ascertained his damages occurred between February 14, 1985 and September 11, 1985. The damages were ascertainable by petitioner when respondent withdrew on April 22, 1985. The District Court correctly made such an express finding on page 4 of its March 1, 1991 memorandum and order. (Refer to pages 23 through 32 of petitioner's petition.) Last, the District Court concluded that even if the September 11, 1985 date was the point in time that petitioner's cause of action accrued, the date is over five (5) years from the date petitioner filed the underlying action, which occurred on December 12, 1990. Petitioner did not require the Court of Appeals to dismiss, as frivolous, his appeal, in order to establish the accrual date of any action on an alleged malpractice and/or any fraud. As the District Court below determined, at the very latest, the petitioner was aware of or should have been aware of any damage arising from respondent's representation on April 22, 1985 (the date of withdrawal), or by September 11, 1985, at the very latest.

Respondent's raising of the statute of limitations defense was done so in response to petitioner's complaint whether or not fraud, actual or constructive, was alleged. The fact that petitioner recently chose to label or argue his cause of action as a constructive fraud count does little to alter the fact that the statute of limitations defense was previously raised in opposition to the cause of action pleaded and is, therefore, effective for such cause of action. Further, the District Court held that petitioner failed to adequately plead fraud. (Refer to petitioner's petition for writ of certiorari, page 29.)

Accordingly, this Court must deny the petitioner's petition for writ of certiorari on the further basis that the District Court did not err in dismissing his *cause* of action on the basis that petitioner did not file his case within the relevant statute of limitations.

IV.

The District Court did not err in sustaining defendant's (respondent's) motion to dismiss for failure to state a claim upon which relief may be granted as plaintiff (petitioner) did not rely on constructive fraud as a basis of his cause of action and/or defendant timely raised the statute of limitations defense to plaintiff's (petitioner's) legal malpractice and/or fraud claims thereby not entitling plaintiff (petitioner) to proceed to a jury trial.

Petitioner argues that on page 14 through 18 of his petition for writ of certiorari that he was denied his right to a jury trial for his cause of action sounding in constructive fraud due to the District Court's error in granting respondent's motion to dismiss for failure to state a claim upon which relief may be granted. Respondent is aware of no right to a jury trial where a litigant lacks a cause of action upon which to base such a claim for a right to a jury trial. Petitioner in the instant case, as determined by the District Court, failed to adequately plead any claim of fraud within the time period allotted by the statute of limitations, and therefore has no cause of action for which to assert a right of jury trial. Accordingly, this Court must deny petitioner's petition for writ of certiorari on the basis that the trial court did not err in dismissing his cause of action on the basis that petitioner did not file his case within the relevant statute of limitations.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

RONALD C. WILLENBROCK
AMELUNG, WULFF &
WILLENBROCK
Attorneys for Respondent

APPENDIX A — APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

THE SUPREME COURT OF THE UNITED STATES

WILLIAM H. VIEHWEG,

Pltf, Aplt, Petitioner,

V.

JOSEPH F. DEVEREUX, JR.,

Dfnt, Aple, Respondent.

JUSTICE STEVENS

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

COMES NOW Petitioner William H. Viehweg and as per SCR 13.6 timely files his application for extension of time to file his petition for writ of certiorari more than ten (10) days before said petition's current due date, and in support thereof, states:

1. This Court has jurisdiction as Viehweg seeks a review of a judgment and opinion (September 24, 1991) of the United States Court of Appeals, Eight Circuit, concerning a judgment issued in an original civil action in the United States District Court, Eastern District of Missouri, Eastern Division, with no request for rehearing made.

2. The trial court dismissed Viehweg's complaint at the pleading stage and the appellate court upheld.

Appendix A

3. Viehweg, a non-attorney, has been pro se throughout this action solely because of his inability to obtain legal counsel.

4. As a pro se, Viehweg misunderstood the ninety (90) days filing as merely a notice of appeal, not necessitating a complete petition upon which the immediate fate of Viehweg's action will be determined.

5. As such, Viehweg spent most of his allotted time soul searching and issue challenging and only recently did "decide" to appeal and now finds himself faced with the difficult task of writing a petition that not only conforms with the on-first-sight complicated rules of procedure, but also is able to hopefully persuade this august court to take my issues serious — whether or not it ultimately decides to grant my writ.

6. The subject matter involved in this action is fraud by an attorney upon his client, and as such is, besides being delicate, difficult and serious.

7. As the original action was dismissed at the pleading stage, with no injunction or stay issued, no party will be prejudiced in anyway should this court grant this application.

Therefore, petitioner Viehweg prays that this Court grant him sixty (60) days, to and including Friday, February 21, 1992, in which to file his petition for a writ of certiorari.

s/ William H. Viehweg
WILLIAM H. VIEHWEG
PETITIONER, Pro Se
114 W. 2nd South
Mt. Olive, Illinois 62069
1-217-999-5061

Appendix A

AFFIDAVIT OF SERVICE

I, William H. Viehweg, the undersigned, do under oath, say that a copy of petitioner's application for extension of time to file petition for writ of certiorari was mailed first class, prepaid, via the U.S. mails, by myself, on December 7, 1991, to Ronald C. Willenbrock, attorney for Respondent Devereux, of the law office of Amelung, Wulff & Willenbrock, at 515 Olive Street, Suite 1700, St. Louis, Mo. 63101.

s/ William H. Viehweg
WILLIAM H. VIEHWEG,
Petitioner
114 W. 2nd South
Mt. Olive, Ill 62069
1-217-999-5061

Subscribed to and sworn to before me Sharon Ruemmler on this 7th day of December, 1991, Notary Public

s/ Sharon Ruemmler
Signature

OFFICIAL SEAL
Sharon L. Ruemmler
Notary Public, State of Illinois
My Commission Expires 2-10-94

APPENDIX B — MOTION IN OPPOSITION TO APPLICATION FOR EXTENSION OF TIME

THE SUPREME COURT OF THE UNITED STATES

WILLIAM H. VIEHWEG,

Pltf, Aplt, Petitioner,

vs.

JOSEPH F. DEVEREUX, JR.,

Dfnt, Aple, Respondent.

JUSTICE J. STEVENS

MOTION IN OPPOSITION TO PETITIONER'S "APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

COMES NOW respondent, Joseph F. Devereux, Jr., by and through his attorney, Ronald C. Willenbrock, and pursuant to SCR Part V — Motions and Applications, Rule 21.4 files his Motion in Opposition to Petitioner's "Application for Extension of Time to File Petition for Writ of Certiorari".

For grounds of said Motion in Opposition, respondent states:

1. SCR 13.6 provides "an application to extend the time to file a Petition for Writ of Certiorari must set out the grounds . . ., and must set forth with specificity the reason why the granting of an extension of time thought justified. . . . an application to extend the time to file a Petition for a Writ of Certiorari is not favored."

Appendix B

The grounds petitioner sets forth for his seeking an application for extension of time consists of:

> a) "The Trial Court dismissed Viehweg's Complaint in the pleading stage and the Appellate Court upheld."
>
> b) "Viehweg, a non-attorney, has been pro se throughout this action solely because of his inability to obtain legal counsel."
>
> c) "As a pro se, Viehweg misunderstood the ninety (90) day filing as merely a Notice of Appeal, not necessitating a complete Petition upon which the immediate fate of Viehweg's action will be determined."
>
> d) "As such, Viehweg spent most of his allotted time sole searching and issue challenging and only recently did 'decide' to appeal and now finds himself faced with the difficult task of writing a Petition that not only conforms with the on-first-cite complicated Rules of Civil Procedure, but also is able to hopefully persuade this august court to take my issues seriously — whether or not it ultimately decides to grant my Writ."
>
> e) "The subject matter involved in this action is fraud by an attorney upon his client, and as such is, besides being delicate, difficult and serious."

The items referred to the above as set forth by petitioner does not meet the standard of "good cause shown" for granting

of extension. *Kleem v. Immigration and Naturalization Service,* 107 S.Ct. 484, 479 U.S. 1308, 93 L.Ed.2d 566; *Mississippi v. Turner,* 111 S.Ct. 1032, 112 L.Ed.2d 1172.

THEREFORE, respondent, pursuant to Part V — Motions and Applications — SCR 21.4, files this Response in Opposition to Petitioner's Application for Extension of Time to File Petition of Writ of Certiorari, and respectfully requests that Petitioner's Application Be Denied.

s/ Ronald C. Willenbrock
RONALD C. WILLENBROCK
#18938
AMELUNG, WULFF &
WILLENBROCK
Attorney for Defendant-Appellee-
Respondent
Joseph F. Devereux, Jr.
515 Olive Street, Suite 1700
St. Louis, Missouri 63101
436-6757

Appendix B

CERTIFICATE OF SERVICE

I, Ronald C. Willenbrock, the undersigned, do under oath, say that a copy of Respondent's Motion in Opposition to Petitioner's Application for Extension of Time to File Petition for Writ of Certiorari was mailed first class, prepaid, via the U.S. Mail, by myself, December 12, 1991 to: William H. Viehweg, pro se petitioner, 114 West Second Street, Mount Olive, Illinois 60269.

s/ Ronald C. Willenbrock
RONALD C. WILLENBROCK
#18938

Subscribed to and sworn before me, a notary public, this 12th day of December, 1991.

_____
NOTARY PUBLIC

My Commission Expires:

_____

12-12.42-454/RCW/bmh

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT DATED SEPTEMBER 24, 1991

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-1798EMSL

William H. Viehweg,

Appellant,

vs.

Joseph F. Devereux, Jr.,

Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

September 24, 1991

Appendix C

A true copy.

Attest: s/ Illegible

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED 10/17/91

Filed: 10/21/91

U.S. DISTRICT COURT
E. DISTRICT OF MO.

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED SEPTEMBER 11, 1991

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 91-1798

Appeal from the United States District Court for the Eastern District of Missouri

[UNPUBLISHED]

William H. Viehweg,

Appellant,

vs.

Joseph F. Devereux, Jr.,

Appellee.

Submitted: September 11, 1991

Filed: September 24, 1991

Before JOHN R. GIBSON, WOLLMAN, and MAGILL, Circuit Judges

PER CURIAM.

Appendix D

William H. Viehweg appeals from the district court's[1] order dismissing under Federal Rule of Civil Procedure 12(b)(6) his complaint claiming breach of fiduciary duty and fraud against his former attorney, Joseph F. Devereux, Jr. We affirm.

Whether a complaint states a cause of action is a question of law which this court reviews de novo. *Hilton v. Pine Bluff Public Schools,* 796 F.2d 230, 231 (8th Cir. 1986). This court also reviews de novo a district court's interpretation of state law. *Salve Regina College v. Russell,* 111 S. Ct. 1217, 1221 (1991). The district court correctly determined that Viehweg's action was required to be brought within five years under Mo. Rev. Stat. §§ 516.120(4) and (5) (1986). *See Vogel v. A.G. Edwards & Sons, Inc.,* 801 S.W.2d 746, 752 (Mo. Ct. App. 1990); *Carr v. Anding,* 793 S.W.2d 148, 149-50 (Mo. Ct. App. 1990). The court also correctly determined that the cause of action accrued at the latest on September 11, 1985. *See* Mo. Rev. Stat. §§ 516.100 and 516.120(5); *Zero Mfg. Co. v. Husch,* 743 S.W.2d 439, 441 (Mo. Ct. App. 1987); *Kueneke v. Jeggle,* 658 S.W.2d 516, 518 (Mo. Ct. App. 1983). We find meritless Viehweg's argument that he pleaded facts showing his action was not time-barred.

Devereux properly raised the statute of limitations defense. *See Southwestern Bell Tel. Co. v. Buie,* 758 S.W.2d 157, 161 (Mo. Ct. App. 1988). In any event, Viehweg's complaint reveals a time bar on its face. *Schnabel v. Taft Broadcasting Co.,* 525 S.W.2d 819, 821 (Mo. Ct. App. 1975) (if time bar clearly appears from face of pleading motion to dismiss even without specification of grounds properly sustained); *see also Zero Mfg. Co.,* 743 S.W.2d at 441.

---

1. The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri.

Appendix D

We also conclude that the court properly denied Viehweg leave to file a second amended complaint and to join an additional defendant, and that the court properly denied his requests for sanctions as moot.

Accordingly, the judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

Supreme Court, U.S.
FILED
MAR 3 1992
OFFICE OF THE CLERK

No. 91-1220

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIAM VIEHWEG,

Petitioner,

V

JOSEPH DEVEREUX

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITIONER'S BRIEF IN REPLY

WILLIAM H. VIEHWEG
PRO SE
114 W. SECOND SOUTH
MT. OLIVE, ILL. 62069
1-217-999-5061

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court is with jurisdiction to review petitioner's petition for writ of certiorari as concerns a timely filing.

2. Whether the District Court correctly applied Missouri law and observed Petitioner's due process rights in dismissing Petitioner's cause of action for fraud as being time barred.

3. Whether the District Court correctly applied Missouri law and observed Petitioner's due process rights in dismissing Petitioner's fraud action as being "improperly" pled, and then denied his motion to amend.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Perceived Misstatements of Fact/Law .	1
Reasons for Granting the Writ	4
I. This Court has jurisdiction to review Petitioner's petition for writ of certiorari in that the petition was timely filed.....	4
II. The district court incorrectly applied Missouri law and denied Petitioner his due process rights in dismissing his cause of action for fraud as being time barred..	7
III. The district court incorrectly applied Missouri law in both dismissing Petitioner's fraud action as being "improperly" pled and denying his motion to amend, thereby violating Petitioner's	

Contents

Page

due process rights..... 13

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

Albert v Grant Thornton

735 F. Supp 1443 (W.D. Mo. 1990).. 9,12

Arana v Koerner

735 S.W.2d 729 (Mo App 1987)..... 14

Burr v National Life & Acc. Ins. Co.

667 S.W.2d 5 (Mo App 1984)..... 11

Gardine v Cottey

230 S.W. 2d 731 (Mo banc 1950).... 14

Mississippi v Turner, ___ U.S. ____

111 S. Ct. 1032 (1991)..... 5

Schwartz v Lawson

797 S.W. 2d 828 (Mo App 1990)..... 9

Vogel v A.G. Edwards & Sons, Inc.

801 S.W.2d 746 (Mo App 1990)..... 10

White v Mulvania

Contents

Page

575 S.W.2d 184 (Mo banc 1978)..... 13

Yeager v Wittels

517 S.W.2d 457 (Mo App 1974)..... 12

Zero Mfg. Co. v Husch

743 S.W.2d 439 (Mo App 1987)..... 9,12

References:

37 Corpus Juris Secundum - Fraud.... 16

No. 91-122?

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIAM VIEHWEG,
Petitioner,

V

JOSEPH DEVEREUX
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITIONER'S BRIEF IN REPLY

PERCEIVED MISSTATEMENTS OF FACT OR LAW

1. Respondent incorrectly states that the "ascertainment of damages" test for statute of limitation purposes is applicable to Petitioner's tort of fraud.

2. Respondent incorrectly states

that the existence of an attorney/client relationship does not affect the tolling of a cause of action for fraud.

3. Respondent incorrectly states that Petitioner did not plead constructive fraud.

4. On page 10, Respondent seems to infer that paragraph 12 of Petitioner's first amended complaint shows this Petitioner's knowledge, at the time of withdrawal, of any alleged fraud upon him by the Respondent. Said paragraph states only that Respondent knew of such matters, not that Petitioner did.

5. Under perceived misstatements of fact or law, Respondent argues that Petitioner's statement, that he initiated this civil action exactly five years after the court of appeals dismissed the underlying action, is incorrect. Respondent changes the subject matter of the Petitioner's statement in order to

invalidate it. The Petitioner's statement, as made, is correct.

6. Under Statement of the Case, Respondent states that the "petitioner moved to file his second amended complaint to add allegations". Such a characterization is less than complete. On January 25, 1991, Respondent filed three motions: to dismiss for failure to state a claim in a short and plain statement or in the alternative to compel separation into counts; to strike averment #37; and to strike multiple averments as being redundant, immaterial, etc. Petitioner responded by moving for leave to file a proposed second amended complaint separating the claim into counts (actually eliminating two); eliminating completely paragraph #37; and further eliminating much of the matter referred to as redundant - all in attempted compliance with Respondent's request.

7. Petitioner has moved to strike the following three statements as irrelevant and not of record: On page 2, middle paragraph, entire sentence beginning with "Subsequent" and ending with "action"; On page 6, entire paragraph designated number two; and on page 9, last paragraph, entire sentence beginning with "Respondent" and ending with "action".

REASONS FOR GRANTING THE WRIT

I.

This Court has jurisdiction to review Petitioner's petition for writ of certiorari in that the petition was timely filed.

Respondent appears to argue that the petition was untimely filed and that Petitioner's application for extension of time to file his petition was unlawfully granted. Actually, the petition is timely unless the granting of said application is

now reversed. The question Respondent is really raising is whether Associate Judge Blackmun abused his discretion in granting Petitioner's said application.

Respondent cites two cases, yet neither case is directly on point. Both cases involve client representation by counsel, not non-attorney pro se's alleging inability to obtain counsel, and both cases involve the initial denial of applications for extensions of time, not the retroactive reversals thereof. Further, though both cite applications that were found to be lacking "good cause shown", what Respondent does not provide in his brief is Justice Scalia's qualifying statement (In MISSISSIPPI v TURNER, ____ U.S. ____, 111 S. CT. 1032 (1991) which reads:

> "In my view, counsel's overextended caseload is not "good cause shown", unless it is

> the result of events unforeseen and uncontrollable by both counsel and client."

That this good faith non-attorney Petitioner was unwillingly pro se certainly raises the question of how much he could have foreseen and controlled, and therefore could support more leniency.

Besides, ninety days from the Appellate Court's judgment of September 24, 1991 was December 23rd. When this Court approved said application on December 17th there were still six days left. Therefore, it can <u>not</u> <u>now</u> be argued that had this Court denied Petitioner's request he could not have responded in time.

For this court to now withdraw its permission would be grossly and patently unfairly prejudicial to Petitioner and would undermine any confidence any future party could have in the validity of this

Court's orders for extensions of time. Petitioner risked subjecting himself to a potentially horrendous last minute effort if his application had been denied. He should not have to risk relying on this Court's order granting such request.

Though Respondent, understandably, may feel the granting was somewhat lenient, and though it may have been, leniency does not raise such granting to the level of abuse of discretion.

Respondent's challenge to this Court's jurisdiction as to a timely filing is less than meritless. Associate Judge Blackmum did not abuse his discretion; the petition is timely; this Court has jurisdiction; and this Petitioner is most grateful.

II

The district court incorrectly applied Missouri law and denied Petitioner his due process rights in dismissing his

cause of action for fraud as being time barred.

It is important to remember here that the only cause of action being reviewed is that for fraud, especially constructive fraud. Though Petitioner's complaint does plead the elements of the tort of intentional breach of fiduciary duty, the lower courts were correct in ruling such tort barred by the statute of limitations. The problems here are derived from both the lower courts and the Respondent confusing the substantially different applications of statute of limitations tests for the two almost identical torts. They cite cases that do not support their findings unless the cases are either partially or completely misread.

The first problem is that the lower courts incorrectly applied the "ascertainment of damages" test (which is applicable to the accrual of the cause of

action for the tort of breach of fiduciary duty) to the tort of fraud, the accrual of which is governed by a different standard, that being the "discovery of the fraud" test. When Petitioner could have ascertained his damages has nothing to do with time limitations as to fraud. An excellent discussion, directly on point, is found in either Albert v Grant Thornton 735 F. Supp 1443,1446-8[1-2] (W.D. Mo 1990) or Schwartz v Lawson 797 S.W.2d 828,832[1,2] (Mo App 1990)

The second problem is that the court incorrectly applied the ruling in ZERO MFG. CO. v HUSCH 743 S.W.2d 439, 441[5] (Mo App 1987) which states only that a cause of action for legal malpractice is not tolled by the existence of a continuing attorney/client relationship. Though such ruling is applicable to a negligent breach of fiduciary duty, it is not applicable to the intentional tort of

fraud. With fraud, the existence of a fiduciary relationship can potentially toll the cause of action. Which brings us to the third problem.

The third problem is that the lower courts incorrectly applied the "should or could have discovered" test to Petitioner's fraud action. The standard discovery test is whether the plaintiff could have or should have discovered using due diligence. But, if the alleged fraud occurs during a fiduciary relationship, that discovery test becomes qualified with the discovery now having to be actual. Petitioner had no duty to double check the "professional" services of Respondent. Vogel v A.G. Edwards & Sons, Inc. 801 S.W.2d 746,754 (MoApp 1990)

Therefore, as Petitioner did allege such a fiduciary relationship, the question is not the duty oriented when he could or should have discovered the fraud,

but rather the fact oriented when he did discover the fraud. Petitioner pled in his complaint that he did not discover the fraud until the fall of 1990 (Petition Appendix page 49, Paragraph 16) So far there have been no pleadings or facts presented in court to the contrary. Petitioner need not have even pled due diligence. Burr v National Life & Acc. Ins. Co. 667 S.W.2d 5,7[6] (MoApp 1984)

The final problem is that the courts incorrectly applied an objective test (decided as a matter of law). Though it is applicable to the ascertainment of damages test for breach of fiduciary duty, and possibly to the could or should have test for discovery of fraud, it is not applicable to the fact question of when Petitioner actually knew of the fraud.

As stated above, the question is when Petitioner actually knew, and he has pled that he didn't until the fall of 1990.

Though it can be inferred that Petitioner suspected negligence on behalf of Respondent during the relationship, negligence is not the intentional tort of fraud. Zero Mfg. Co.v Husch 743 S.W.2d 439,442[8-11] (MoApp 1987) Therefore such inference can not lead to a deduction that Petitioner actually knew of the alleged fraud. Directly on point here is Yeager v Wittels 517 S.W.2d 457,465[10] Therefore the test here is subjective and it is a matter for the jury should it become a contested allegation (as yet, Respondent, who for his defense bears the burden of proof, has not countered Petitioners allegations). The jury must find that Petitioner actually knew of the fraud before the date five years previous to the filing of his complaint, or December 12, 1985. Albert v Grant Thornton 735 F.Supp 1443,1448 (W.D. Mo.1990) Only then will Respondent's defense of statute of

limitations be capable of being granted - legally.

III

The district court incorrectly applied Missouri law in both dismissing Petitioner's fraud action as being "improperly" pled and denying his motion to amend, thereby violating Petitioner's due process rights.

The lower court's rulings do not say that Petitioner failed to plead the elements of fraud, just that he did not plead them properly. And there is more than one kind of fraud.

As to actual fraud, though the elements are there, they may not be very "proper". But because of the facts of this case, Petitioner is not even required to plead actual fraud. White v Mulvania 575 S.W.2d 184,188[7-9] (Mo banc 1978)

As the alleged fraud occurred during

an attorney/client relationship and involves the intentional breach of a fiduciary duty, Petitioner need only plead constructive fraud.

Missouri law has long held that a breach of fiduciary duty is constructive fraud. Gardine v Cotty 230 S.W.2d 731,739[7-9] (Mo banc 1950); Arana v Koerner 735 S.W.2d 729,735[10-13] (MoApp 1987) Case law only requires two elements to be pled: 1) that there was a fiduciary relationship and 2) that a fiduciary duty was intentionally breached. In other words, the elements for constructive fraud are identical as those for intentional breach of fiduciary duty.

And since the lower courts have effectively held that Petitioner did plead the elements for breach of fiduciary duty, he therefore also plead the elements for constructive fraud. No case law requires any further pleading,and neither the lower

court's rulings nor the Respondent has identified any element not pled by Petitioner. The big difference here being that said elements interpreted as an action for breach of fiduciary duty were time barred, but the same elements being considered as an action for constructive fraud, are not.

Missouri has long held that leave to amend be freely given with five and six amendments not being unusual. And certainly no action should be dismissed with prejudice (as was Petitioner's) as long as the plaintiff can possibly correct a default in his pleadings. Petitioner has shown that he was more than willing to correct any form error in his pleadings, and considering that Petitioner is an unwilling pro se, held to a lower standard of pleading, the courts should certainly allow him leave to correct any correctable deficiencies.

A breach of duty which irrespective of moral quilt, the law declares fraudulent because of its tendency to deceive , to violate confidence, or to injure public interest. 37 Corpus Juris Secundum, §2, pages 211-212

Surely this Petitioner's pursuit to hold a court appointed attorney accountable to allegations of constructive fraud are in not only the public's best interest, but also this Court's.

CONCLUSION

The district court misapplied long established Missouri statutory and common law. There is no case law in support of the court's decision. For a federal court to fatally misapply state law is a clear and unquestionable denial of due process. This Petitioner is not asking this Court to make any new constitutional interpretations here, only asking that it apply long established ones.

Petitioner's petition for writ of certiorair should be granted.

William H. Viehweg
Petitioner, Pro Se
114 W. 2nd South
Mt. Olive, Il 62069
217-999-5061

Supreme Court, U.S.
FILED
FEB 20 1992
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

WILLIAM H. VIEHWEG, Plaintiff, Appellant, Petitioner, vs. JOSEPH F. DEVEREUX, JR., Defendant, Appellee, Respondent.	)	Cause No.: 91-1220 October Term, 1991

RECEIVED
FEB 26 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RESPONSE OF RESPONDENT JOSEPH F. DEVEREUX, JR. TO THE MOTION OF PETITIONER TO STRIKE AND FOR SANCTIONS

COMES NOW Respondent Joseph F. Devereux, Jr., by and through his attorneys, pursuant to Supreme Court Rule 21.4 files his response in opposition to the Motion of Petitioner to Strike and for Sanctions.

For grounds of said response, Respondent states:

1. On February 24, 1992, Respondent received through regular mail, the Motion of Petitioner to Strike and for Sanctions.

2. Petition cites Supreme Court Rule 24.6 as the basis for his Motion to Strike and for Sanctions apparently arguing that this Court should strike irrelevant matters from Respondent's Brief in Opposition to Petitioner's Writ of Certiorari.

3. Petitioner's reliance on Supreme Court Rule 24.6 to strike irrelevant matters in Respondent's Brief in Opposition is inappropriate as Rule 24.6 governs the contents of all briefs on the merits of a particular case. Consequently, such rule cannot be the basis for a Motion to Strike portions of a Respondent's Brief in Opposition to a Petition for Writ of Certiorari or for a Motion for Sanctions.

4. Should, however, the Court find that Petitioner has an arguable basis upon which to bring his Motion to Strike and for Sanctions, such relief should be denied because Petitioner is arguing matters that are reserved for argument on the merits.

5. Further, should the Court entertain Petitioner's motions, Petitioner's relief requesting the striking of various portions of Respondent's Brief in Opposition to his Writ of Certiorari and for Sanctions should be denied since Petitioner misstates the record and the law. The fact that Petitioner instructed the Respondent to withdraw is relevant in that it is evidence indicative of the litigants' legal relationship. The Trial Court was not required to consider the facts surrounding Respondent's withdrawal from the representation of Petitioner in Respondent's Motion for Summary Judgment. Consequently, the Trial Court did not determine whether or not the circumstances surrounding Respondent's withdrawal were material, relevant, or irrelevant. Such matters lacked materiality in the Motion for Summary Judgment which was premised upon the Statute of Limitations, but still retain relevancy with respect to the overall case.

6. Further, should the Court entertain Petitioner's motions, Petitioner's argument that the record does not contain any reference to Respondent's consensual withdrawal is misleading and improper. There is ample support of record for Respondent's consensual withdrawal, as well as an admonishment from U.S. Dis-

trict Judge Hungate in the case styled RE/MAX of America, Inc. v. William H. Viehweg, Cause No. 85-0349C(3), (E.D.Mo. 1985), that Petitioner's consent to the withdrawal of Respondent, was the equivalent of discharging the best attorney for which to handle the case. Judge Hungate further rejected Petitioner's request for appointment of new counsel. Such statements are contained in the recording of the withdrawal proceeding which are currently stored in the U.S. District Court archives in Kansas City, Missouri. It is clear then, that the above and other pleadings in the case, support Respondent's consensual withdrawal from the representation of Petitioner. It appears that Petitioner misunderstands that the record can and does contain all pleadings and rulings of the Court and not simply limited to Petitioner's First Amended Petition.

7. In conclusion, the motion of Petitioner to strike portions of Respondent's Brief in Opposition to his Writ of Certiorari and Motion for Sanctions should be denied in that Petitioner bases his motions on Supreme Court Rule 24.6, which is inapplicable to Petitions for Writ of Certiorari. Further, the Motion of Petitioner to Strike and for Sanctions should be denied due to the fact that Petitioner is wrongfully arguing the merits of his case while his Petition for Writ of Certiorari is pending. Further, even if the Court considers the Motion of Petitioner to Strike and for Sanctions, such should be denied in that Petitioner fails to establish that any of the statements made by Re-

spondent in his Brief in Opposition were irrelevant in nature or not a matter of the record. Last, Respondent requests that sanctions be assessed against Petitioner and awarded to Respondent for requiring him to respond to groundless, baseless and frivolous motions.

WHEREFORE, Respondent, respectfully requests that the Motion of Petitioner to Strike and for Sanctions be denied, and that sanctions be assessed against Petitioner.

RONALD C. WILLENBROCK #18938
AMELUNG, WULFF & WILLENBROCK
Attorney for Respondent
515 Olive Street, Suite 1700
St. Louis, Missouri 63101
436-6757

CERTIFICATE OF SERVICE

I, Ronald C. Willenbrock, the undersigned, do under oath, say that a copy of the Response of Respondent Joseph F. Devereux, Jr. to the Motion of Petitioner to Strike and for Sanctions was mailed first class, prepaid, via the U.S. Mail, by myself, February 25, 1992 to: Mr. William H. Viehweg, pro se, 114 West 2nd South, Mt. Olive, Illinois 62069.

RONALD C. WILLENBROCK #18938

Subscibed to and sworn before me, a notary public, this 25th day of February, 1992.

NOTARY PUBLIC

My Commission Expires:

RCW/KDW/lat 2-24.42-454

ROBERT J. WULFF
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES 4/6/94
ST. LOUIS COUNTY